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No. 05-1385

Supreme Court, U.S.
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In The Supreme Court of the United States

STATE OF OREGON, by and through its DEPARTMENT OF HUMAN SERVICES; BRUCE GOLDBERG, in his official capacity as Director, OREGON DEPARTMENT OF HUMAN SERVICES,

Petitioners,

v.

ASW, Individually and as Guardian Ad Litem for MSW and OSW, Minors; SSW; ALC, Individually and as Guardian Ad Litem for SRC and JSC, Minors; JKC; JSS, Individually and as Guardian Ad Litem for BKS, a Minor; SDS; CEW,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF FOR THE RESPONDENTS IN OPPOSITION

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QUESTIONS PRESENTED

Respondent adoptive families have revised the questions presented by Petitioners to more accurately reflect the rulings of the courts below. The case presents the following questions:

1. Did the Ninth Circuit err in holding that Congress unambiguously conferred upon Adoption Assistance Program (AAP) recipients a federal right to individualized payment determinations and a federal right to a state administrative hearing to challenge a denial of program benefits?

2. Did the Ninth Circuit err in holding that AAP recipients state a claim upon which relief may be granted when they claim that a State's implementation of a uniform percentage reduction in adoption assistance benefits that included a ban on ever challenging the reduction in a state administrative hearing violates the adoptive families' federal right to individualized payment determinations and a "fair hearing"?

3. Did the Ninth Circuit err in concluding that the requirement that the AAP recipient's program benefits be memorialized in a binding agreement, does not preclude enforcement in a § 1983 action of the right to individualized payment determinations and the right to a state administrative hearing when program benefits are denied?

4. Did the Ninth Circuit err in concluding that the presumption of enforceability under § 1983 is rebuttable and that once the Respondent adoptive families demonstrated that the AAP statute confers an enforceable federal right, the burden shifted to the State to demonstrate that Congress intended to foreclose the § 1983 remedy?

QUESTIONS PRESENTED – Continued

5. Did the Ninth Circuit err in deciding that Respondents' claim to a right of individualized AAP payment determinations and a right to a fair hearing is not subject to dismissal for failure to state a claim upon which relief may be granted by not giving weight to a letter from the federal agency in charge of overseeing the AAP program expressing the view that an across-the-board percentage reduction in AAP benefits can be made in conjunction with an across-the-board percentage reduction in foster care payments?

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STATEMENT

I. Introduction

The Respondent adoptive families brought a § 1983 case challenging Oregon's implementation of an across-the-board 7.5% reduction in adoption assistance program benefits and ban on ever using the state administrative hearing process to contest the implementation as a violation of their federal rights under the Adoption Assistance Program (AAP) in Title IV-E of the Social Security Act, 42 U.S.C. §§ 670-679b. The district court dismissed the suit holding that the adoptive families did not have a viable § 1983 cause of action based on Oregon's reduction. The Ninth Circuit reversed and remanded the district court's dismissal. In doing so, the Ninth Circuit expressly declined to rule on the merits of the adoptive families' claim that the reduction was unlawful. Rather, the circuit court held that the Respondent adoptive families' case was not subject to dismissal for failure to state a claim upon which relief could be granted because the AAP statute confers enforceable federal statutory rights to individualized payment determinations under 42 U.S.C. § 673(a)(3) and to a state administrative hearing pursuant to 42 U.S.C. § 671(a)(12).

The State of Oregon's petition for certiorari from the Court of Appeals presents no compelling reasons for review in this Court and should be denied. The ruling appealed from below does not present a conflict with decisions of the circuit courts or this Court and does not present any important unresolved federal question. The Petitioners do not, in fact, allege a conflict but rather suggest that there is confusion in the lower courts determining whether a federal statute confers an enforceable federal right. Pet. 13. However, as Petitioners demonstrate

in their petition, the lower courts are not confused. Over the last four years, the circuit courts have consistently recognized and applied the analysis provided by this Court in *Gonzaga Univ. v. Doe*, 536 U.S. 273 (2002).

While this case is of great importance to the litigants, it does not present any important unresolved federal question. In *Gonzaga*, this Court provided definitive guidance on the general question of whether a federal statute confers an enforceable federal right and that guidance has proven to be consistently workable in the context of cooperative federal-state benefits programs. The circuit court below correctly applied the *Gonzaga* framework in determining that the AAP statute unambiguously confers a federal right to individualized payment determinations and a state administrative hearing to challenge a denial of benefits. The questions Petitioners present for review essentially claim errors in the application of correctly stated rules of law established by this Court. In light of the above, there is no compelling reason for the Court to review the circuit court's ruling that the Respondent adoptive families may proceed in district court with their claim.

II. Background

A. The Adoption Assistance Program

The Adoption Assistance and Child Welfare Act of 1980, as amended by the Adoption and Safe Families Act of 1997, was designed to achieve safety and permanency for abused and neglected children through a series of mandated programs and services and the provision of federal matching funds. *See*, Pub.L. No. 96-272, 94 Stat. 500 (1980) and Pub.L. No. 105-89, 111 Stat. 2115 (1997).

The Adoption Assistance Program (AAP) is mandated under the Act to help foster children achieve permanency through adoption. *See*, 42 U.S.C. § 670. A cornerstone of the program is the requirement of participating States to financially assist with addressing the individualized special needs of the adopted foster child by providing benefit payments to adoptive parents. *See*, 42 U.S.C. § 673. The AAP statute expressly mandates that the payment amount be individually determined by agreement between the State and adoptive parents, and based on the individual needs of the child and the individual circumstances of the adoptive family. 42 U.S.C. § 673(a)(3). The AAP payment is otherwise limited only by a rate ceiling equal to the standardized rate that would be paid if the adopted child were still in foster care. *Id.*

AAP differs from other public benefit programs in several distinctive ways: (1) the amount of the payment is negotiated based on individual need and circumstance rather than determined by a standardized rate schedule or a predetermined level of need; (2) adoptive families are not means tested; (3) payments are made pursuant to contracts between the agency and the adoptive family; (4) contracts are entered into for the period of the child's minority; and (5) program benefits are available to adoptive families that reside in, or move to, another state. 42 U.S.C. § 673 and § 675(3); 45 C.F.R. § 1356.40. AAP is not a block grant program as the Petitioners contend, but rather an uncapped federal entitlement program. 42 U.S.C. § 674, Pet. 2. States are reimbursed for a certain percentage (50% in the case of Oregon) of each AAP payment made on behalf of a federally eligible adopted child, in addition to a percentage of program administration costs. *See*, 42 U.S.C. §§ 674(a) & (c).

B. Oregon's Implementation of the Uniform Reduction in AAP Payments

In February 2003, Oregon implemented an across-the-board 7.5% reduction in foster care payments and AAP payments. To implement the AAP payment reduction, Oregon's human services agency promulgated regulations that simultaneously required the 7.5% reduction while prohibiting recipients from challenging that reduction, future similar reductions and denials of future requests for increased benefits needed as a result of hardships suffered from the reductions.

Contrary to Petitioners' assertions, the uniform percentage reduction in AAP payments was made without regard to whether any adoptive family's benefit payment would have exceeded the AAP rate ceiling (*i.e.*, the amount the child would have received in foster care) had the 7.5% reduction been implemented for foster care payments alone. Pet. 3. Not one of the Respondent adoptive families was receiving AAP payments equal to the AAP rate ceiling before the reduction. Nor would any of their pre-reduction AAP payment amounts have exceeded the AAP rate ceiling after Oregon reduced the ceiling by 7.5%.

Nine months after the uniform reduction, Oregon implemented a uniform increase in monthly AAP payments to the pre-reduction levels. Oregon offered adoptive families a prospective increase, effective November 1, 2003, in the monthly adoption assistance benefits to the pre-reduction payment level if the adoptive family agreed to enter into a new assistance agreement that permitted, among other things, future uniform budgetary AAP payment reductions. The Respondent adoptive families declined to enter into a new agreement, but did have their

AAP payments increased to the pre-reduction payment amount.

III. Litigation in the District and Circuit Courts Below

The district court granted Oregon's motion to dismiss the Respondent adoptive families' case holding that Congress did not unambiguously confer upon AAP recipients a federal right to concrete, individualized AAP benefits. Pet. App. 10. The district court also found that the provision in the AAP statute for a binding agreement was a strong indicator that Congress did not intend to create a new federal right to specific adoption assistance payments. However, the district court's analysis never squarely addressed the adoptive families' claims that the AAP statute conferred a federal right to an individualized payment determination and the right to a state administrative fair hearing.

Respondents appealed the district court order dismissing the entire action. The Ninth Circuit ruled that the adoptive families' federal rights claims to individualized payment determinations and to a state administrative hearing when benefits are denied were not subject to dismissal for failure to state a claim upon which relief may be granted. The circuit court expressly declined to rule on the merits, whether Oregon's reduction was unlawful, and reversed and remanded the case to the district court to allow the adoptive families to litigate their claim that Oregon's implementation of the uniform reduction and ban on challenging that reduction in a state administrative hearing violated their federal rights.

REASONS FOR DENYING THE PETITION

I. The Circuit Court Decision Below Does Not Conflict With Any Circuit or Lower Court Rulings

No other circuit court decisions address the issue of whether there is a private right of action under the AAP statutory provisions at issue in this case, or otherwise construe the AAP statute. Petitioners do not allege any conflict among the circuit courts, but suggest that confusion exists after *Gonzaga Univ. v. Doe*, 536 U.S. 273 (2002), in determining whether a federal statute confers an enforceable federal right in the context of a spending clause program. Pet. 18. However, the post-*Gonzaga* circuit cases cited by Petitioners illustrate neither confusion, inconsistencies nor difficulties in applying this Court's precedents.

Petitioners cite five cases from three different circuits, construing five different federal statutes. The analysis in all five cases applies the *Gonzaga* factors in a consistent manner. Two of the five cases held that the statutory provisions in question unambiguously conferred enforceable federal rights; three did not. The differing conclusions in these cases are solely attributable to each court's application of this Court's precedents to the varying text and structure of the different statutory provisions at issue. *See, Long Term Care Pharmacy Alliance v. Ferguson*, 362 F.3d 50 (1st Cir. 2004) (no enforceable right in Medicaid pharmacy rate provision); *Rio Grande Community Health Center v. Rullan*, 397 F.3d 56 (1st Cir. 2005) (enforceable right in Medicaid to wraparound services); *Sabree v. Richman*, 367 F.3d 180 (3rd Cir. 2004) (enforceable right in Medicaid facility provision for disabled adult); *31 Foster Children v. Bush*, 329 F.3d 1255 (11th Cir. 2003) *cert. denied sub nom. Reggie B. v. Bush*, 540 U.S. 984 (2003) (no

enforceable right for foster children in Title IV-E case plan provision); *Arrington v. Helms*, 438 F.3d 1336 (11th Cir. 2006) (no enforceable right for custodial parent in Title IV-D child support collection provision).

Petitioners contend that the circuit courts have not "been uniform in how high to set the bar for plaintiffs to establish an unambiguous federal right." Pet. 13. Yet, each of the cases Petitioners cite, as well as the Ninth Circuit case below, uniformly apply the *Gonzaga* factors that establish the bar. The lower courts, including the circuit opinion below, all recognize that *Gonzaga* changed the landscape and significantly raised the bar for plaintiffs. Petitioners cite to varying acknowledgments in the circuit court opinions that *Gonzaga* raised the threshold plaintiffs must meet, but overlook the fact that each court set the same heightened bar for plaintiffs as set forth in *Gonzaga*. Pet. 13-17. Petitioners' failure to explain how the circuit courts post-*Gonzaga* have not been uniform in determining when a statute confers an enforceable right suggests that Petitioners do not believe that there is a lack of uniformity, but rather that *Gonzaga* was intended to preclude courts from ever finding that Congress unambiguously conferred an enforceable federal right unless expressly provided for in the statute. Petitioners are mistaken about the rule of law established in *Gonzaga* and seek to establish a new rule. The lower courts have uniformly applied the factors in *Gonzaga* that set a high, but not unreachable, bar for plaintiffs to establish that a statute confers an unambiguous federal right. *Gonzaga* continues to provide a workable framework for lower courts that have uniformly recognized and applied the correctly stated rules of law established by this Court.

The Ninth Circuit decision below not only does not conflict with any other circuit decision, but neither does it conflict with any district court decision. Very few district court cases have construed the AAP statute and all have either expressly or impliedly concluded that the statute confers certain enforceable federal rights. *See, E.C. v. Sherman*, 2006 WL 1307641 (W.D.Mo. May 09, 2006) (payment determination provision enforceable); *Glanowski v. New York State Dept. of Family Assistance*, 225 F. Supp.2d 292 (W.D.N.Y. 2002) (eligibility provision enforceable, but plaintiffs not eligible); *Ferdinand v. Department for Children and Their Families*, 768 F. Supp. 401 (D.R.I. 1991) (eligibility provision enforceable).

Even the differing results in the rulings below in this case do not reflect inconsistencies or confusion in the application of *Gonzaga*, but rather the analysis in each decision is applied to a different claim. The district court below held that the AAP statute does not unambiguously confer a federal right to specific adoption assistance payments, while the circuit court held that the AAP statute unambiguously confers a federal right to individualized payment determinations and to a state administrative hearing. Pet. App. 10 & 35.

II. The Decision of the Ninth Circuit Does Not Conflict with any Decision of this Court

The Petitioners do not claim that the Ninth Circuit's ruling in this case conflicts with *Gonzaga*. The circuit court ruling below correctly stated the relevant rules of law established by this Court in *Gonzaga* and systematically applied those rules to the facts in this case to hold that the AAP statute unambiguously confers upon recipients a

federal right to individualized payment determinations and a right to a fair hearing.

The Petitioners' discussion of its third question presented suggests a possible conflict with this Court's opinion in *City of Rancho Palos Verdes v. Abrams*, 544 U.S. 113 (2005). Pet. 21. Petitioners suggest that the circuit court improperly concluded that the burden shifted to the State to show that Congress did not intend the § 1983 remedy after the adoptive families demonstrated that the AAP statute created an individually enforceable right to individualized payment determinations and a fair hearing. However, a review of the Ninth Circuit opinion in this case and the opinion in *City of Rancho Palos Verdes* demonstrates that the two opinions are completely in accord. After discussing how the plaintiffs have demonstrated that the AAP statute confers a federal right, the circuit court concluded that the burden falls on the State to rebut the presumption that the right is enforceable under § 1983. *ASW v. State of Oregon*, 424 F.3d 970, 977 (9th Cir. 2005). Pet. App. 30. The Ninth Circuit court applied the correct rule of law stated in *Gonzaga*, 536 U.S. at 284, and more recently articulated in *City of Rancho Palos Verdes*, the case urged by Petitioners as supporting their position, which states:

> . . . to sustain a § 1983 action, the plaintiff must demonstrate that the federal statute creates an individually enforceable right in the class of beneficiaries to which he belongs. [citation omitted] Even after this showing, "there is only a rebuttable presumption that the right is enforceable under § 1983." *Blessing v. Freestone*, 520 U.S. 329, 341, 117 S.Ct. 1353, 137 L.Ed.2d 569 (1997). The defendant may defeat this presumption by

> demonstrating that Congress did not intend that remedy for a newly created right.

City of Rancho Palos Verdes v. Abrams, 544 U.S. at 120. Again, Petitioners fail to provide any valid example of a conflict between the circuit court's ruling below and the decisions of this Court.

III. This Case Does Not Involve an Important Unresolved Federal Question

This case is important to the litigants, but does not involve any important unresolved federal questions. While the question of whether a federal statute confers an enforceable federal right has general importance, this Court has already established definitive guidance in *Gonzaga* that is uniformly followed by the lower courts. The circumstances of this case do not raise any issues that merit review or clarification of *Gonzaga*. And while the specific question of whether the AAP statute confers any federal rights has not been addressed by this Court, the issue is resolved to the extent that there is no conflict. The dearth of AAP cases and lack of conflict together demonstrate that the program specific issues in this case do not present a federal issue of broad enough import to merit review by this Court.

Petitioners contend that clarification of *Gonzaga* is needed in the context of spending clause programs requiring state plans. However, Petitioners, again, fail to provide any reason why the multi-part analysis required by *Gonzaga* is unworkable in this context. Petitioners' suggestion that a state plan requirement described in terms of the individual beneficiary should not be automatically deemed to confer an enforceable right is flawed in light of

their failure to acknowledge that *Gonzaga* requires more. Pet. 18. The circuit court opinions they cite, as well as the Ninth Circuit opinion below, all required more by applying the analysis established by *Gonzaga*. Furthermore, if Petitioners are suggesting that state plan requirements should never be deemed enforceable, Congress has already spoken on this issue, expressly providing that state plan provisions may not be deemed unenforceable solely because the statutory provisions are state plan requirements. *See*, 42 U.S.C § 1320a-2.

Moreover, this case is not the appropriate vehicle for a general determination of whether a state plan public benefits program statute confers an enforceable federal right. AAP is a uniquely constructed public benefits program that does not have an analogous counterpart among federal programs. The provision for a payment benefit that is individually negotiated and determined based on individual need and circumstance is unique to AAP among all federal public benefits programs. AAP beneficiaries also make up a small fraction of the entire pool of federal benefits program beneficiaries. Thus the practical impact of the outcome of this case on the Petitioners or other states is limited.

IV. Petitioners Seek Correction of Claimed Errors Where the Circuit Court Applied Correctly Stated Rules of Law

Three of the four questions presented in the Petition essentially claim error in the Ninth Circuit's application of correctly stated rules of law to the facts in this case. Petitioners first and second questions contend that the circuit court misapplied correctly stated rules of law established by this Court for determining when a statute

confers a federal right that is enforceable under § 1983. Petitioners do not contend that the circuit court's decision is inconsistent with *Gonzaga*, but rather that the factors established by *Gonzaga* were misapplied to the facts of this case. In support, Petitioners point out that both the district and circuit courts reached different results applying *Gonzaga*. Pet. 18. However, the different outcomes are explained by the circuit court reaching a correct conclusion on an issue the district court never squarely addressed: whether the AAP statute confers an enforceable federal right to individualized payment determinations and a right to a fair hearing.

The fourth question presented by Petitioners seeks to correct an alleged error in a ruling that was never made by the circuit court below, and for which there is no basis for appeal. In its fourth question, Petitioners seek review of the merits of the Respondents' case and erroneously claim that the Ninth Circuit ruled that Oregon's across-the-board percentage reduction was unlawful. The Ninth Circuit opinion specifically provides: "We do not comment on the merits; we merely hold that Plaintiffs' claim is not subject to dismissal for failure to state a claim." *ASW v. State of Oregon*, 424 F.3d at 978. Pet. App. 33. Nonetheless, Petitioners seek review of whether the circuit court erred in not considering a letter from a federal agency to the Petitioners interpreting the agency's policy manual. The circuit court never reached the issue that was the subject of the letter: whether an across-the-board reduction in AAP payments can be made in conjunction with an across the board reduction in foster care rates. Therefore, the federal agency letter was irrelevant to the Ninth Circuit's decision that the AAP statute confers an enforceable federal right

to individualized payment determinations and to a fair hearing.

The circuit court did not err in its application of the properly stated rule of law established in *Gonzaga*. There are no compelling reasons before this Court to depart from the review criteria to exercise its discretion and grant certiorari.

V. As a Practical Matter, This Case Lacks Finality

The circuit decision below is final for jurisdictional purposes. As a practical matter, however, the case has not been litigated and it is premature to involve this Court's review. Petitioners have yet to file an answer and no discovery has been completed in the district court below. The Ninth Circuit has reversed the order of dismissal and remanded the case to allow the parties to proceed with discovery and litigate the merits that have been narrowed on appeal.

CONCLUSION

The circuit court below correctly rejected Petitioners' arguments and applied the correctly stated precedents of this Court. In the absence of any circuit court split, and in light of this Court's settled precedent, there is no compelling reason to review the decision of the lower court. For all of the reasons set forth above, the petition should be denied.

Respectfully submitted,

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